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No. 90-1626

In the Supreme Court of the United States

OCTOBER TERM, 1990

MANLEY ABERCROMBIE, ET AL., PETITIONERS

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Comptroller of the Currency properly assessed civil penalties against petitioners for past violations of a cease-and-desist order.

2. Whether the Comptroller provided petitioners with adequate notice of his intention to assess civil penalties for violations of the cease-and-desist order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-46) is reported at 920 F.2d 1351. The decision of the Comptroller of the Currency (Pet. Supp. App. 1-128) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1990, and a petition for rehearing was denied on January 23, 1991. The petition for writ of certiorari was filed on April 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comptroller of the Currency is responsible for supervising the affairs of national banks and ensuring the

safety and financial soundness of their operations. 12 U.S.C. 1 *et seq*. Congress has given the Comptroller broad statutory powers to carry out his duties, authorizing him to exercise extensive control over banks and their directors, officers and employees. See *First Nat'l Bank of Lamarque* v. *Smith*, 610 F.2d 1258, 1264 (5th Cir. 1980); *Groos Nat'l Bank* v. *Comptroller of the Currency*, 573 F.2d 889, 896 (5th Cir. 1978). Those powers include the authority to charter banks (12 U.S.C. 21); to declare banks insolvent (12 U.S.C. 191); to appoint a receiver to liquidate a bank's assets (12 U.S.C. 1821(c)); to suspend or remove a bank's directors and officers (12 U.S.C. 1818(e)); to issue cease-and-desist orders (12 U.S.C. 1818(b)); and, as is particularly relevant in this case, to impose civil penalties (12 U.S.C. 93(b), 504 and 1818(i)(2)).[1]

2. Petitioners are the directors of Rushville National Bank of Rushville, Indiana, a small, federally chartered bank that is regulated by the Comptroller. Beginning in 1978, the Comptroller discovered serious problems in the Bank's operations. In an effort to correct the Bank's deteriorating condition, the Comptroller and the Bank entered into a cease-and-desist order on June 29, 1983, and an amended cease-and-desist order on June 19, 1984 (collectively the Consent Order). The Consent Order con-

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[1] Congress first granted the Comptroller authority to issue cease-and-desist orders against individuals through the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRA), Pub. L. No. 95-630, § 107(a)(1), 92 Stat. 3649-3650. The FIRA also empowered the Comptroller to assess civil penalties for violations of such orders. § 107(e)(1), 92 Stat. 3660. Congress has since amended Section 1818 to provide for larger daily civil penalties. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 907(a), 103 Stat. 462-464. Unless otherwise noted, all references herein to Section 1818 are to the previous version that was in effect during the events at issue in this case.

sisted of 16 articles that outlined the measures that the directors were to take to improve the safety and soundness of the Bank. Pet. App. 2, 5-6.

The Comptroller conducted an examination on January 31, 1985, and found violations of ten articles of the Consent Order. The Comptroller's letter transmitting the report of that examination warned the directors that they risked assessment of civil penalties. On June 21, 1985, the Comptroller wrote to each director notifying him that the Comptroller was considering whether to assess civil penalties against the individual directors for failing to comply with the Consent Order. On October 25, 1985, the Comptroller, acting pursuant to 12 U.S.C. 1818(i)(2), issued a Notice of Assessment of a Civil Money Penalty assessing a civil penalty of $15,000 against petitioner Hedrick, and civil penalties of $10,000 each against petitioners Abercrombie, Calloway, Eckel, and Sloan. Pet. App. 6-8.[2]

Petitioners requested an administrative hearing, see 12 U.S.C. 1818(i)(2)(iii), but moved for dismissal of the proceedings before a hearing could be held. They argued that: (1) the Comptroller lacked authority to impose personal liability against them without filing suit in district court; and (2) civil penalties could not be assessed administratively for past violations because the statute uses the present-tense verb "continues" in the penalty clause of 12 U.S.C. 1818(i)(2)(i), and thus requires that the violation be ongoing at the time the Notice is issued. The administrative law judge (ALJ) denied the motion. Petitioners then sought an injunction against the administrative proceedings in district court. See *Abercrombie* v. *Office of Comptroller of Currency*, 641 F. Supp. 598 (S.D. Ind. 1986). The district court

[2] The notice was amended on December 5, 1985, to correct technical and typographical errors. Like the court of appeals, we shall refer to the notices collectively as the "October 1985 Notice." Pet. App. 7 n.3.

dismissed the suit for lack of jurisdiction, and the Seventh Circuit affirmed. *Abercrombie* v. *Office of Comptroller of Currency*, 833 F.2d 672 (7th Cir. 1987). See Pet. App. 7-15.

The ALJ resumed the administrative proceedings, held a hearing, and issued a recommended decision and order on March 20, 1989. He rejected petitioners' argument that Section 1818 permitted civil money penalties only for continuing violations. He concluded that petitioners had violated eight of the ten articles of the Consent Order cited by the Comptroller in the Notice and recommended that the civil penalty assessments be reduced to $2,000 for petitioner Hedrick and $1,000 each for petitioners Abercrombie, Eckel, Calloway, and Sloan. Pet. App. 15-16.

The Comptroller issued a final decision on June 20, 1989, that adopted much of the ALJ's reasoning but imposed larger penalties. The Comptroller, like the ALJ, concluded that Section 1818(i)(2)(i) "authorizes the imposition of [civil penalties] for past, present, and continuing violations of a cease and desist order." Pet. Supp. App. 11. The Comptroller also agreed with the ALJ that Section 1818(i)(2)(i) does not require that violators of a cease-and-desist order be given time to cure their violations after a notice of assessment is issued, stating that "the Consent Order itself was adequate notice to [petitioners]." Pet. Supp. App. 17; see Pet. App. 16-18.

Turning to the specific allegations of the Notice, the Comptroller found petitioners in violation of nine of the ten articles charged, including two articles for which the ALJ had found no violation.[3] Although the Comptroller declined to impose the "hundreds of thousands of dollars" of civil penalties that petitioners potentially faced, Pet. Supp. App. 111, the Comptroller disagreed with the ALJ's finding that

[3] The Comptroller also found that violations of at least two articles of the Consent Order continued even after the October 1985 Notice. Pet. Supp. App. 31-32, 41.

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the assessments should be reduced because of evidence of petitioners' good faith. *Id.* at 116-117. On the contrary, the Comptroller found petitioners' "good faith to be seriously deficient" and found the violations to be "more serious" than had the ALJ. *Id.* at 117, 121. The Comptroller therefore set the assessment at $15,000 for petitioner Hedrick and $10,000 each for petitioners Abercrombie, Calloway, Eckel, and Sloan. *Id.* at 112. See Pet. App. 18-20.

3. The court of appeals affirmed the Comptroller's decision. Pet. App. 2. It specifically held "that the Comptroller had the legal authority to impose civil money penalties for actions occurring between the issuance of the cease and desist order and notice of assessment." *Id.* at 44-45. The court concluded that Section 1818(i)(2)(i) was ambiguous as to whether civil penalties may be imposed for "past" violations, but it ruled that the Comptroller's interpretation was "reasonable" in light of the Section's language, purpose, and legislative history. Pet. App. 24-34. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). The court also concluded that petitioners had received adequate notice that they would be subject to civil penalties for failure to comply with the cease-and-desist order. Pet. App. 37-43.

ARGUMENT

1. Petitioners argue that the court of appeals erred in affirming the Comptroller's determination that 12 U.S.C. 1818(i)(2)(i) authorizes civil money penalties for past—as well as present and continuing—violations of cease-and-desist orders. Pet. 27-29. Petitioners principally contend that the Comptroller's construction is inconsistent with Section 1818(i)(2)(i)'s language and contrary to this Court's decision in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), and the Seventh

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Circuit's decision in *Cutten* v. *Wallace*, 80 F.2d 140 (1935), aff'd, 298 U.S. 229 (1936). See Pet. 7-25. Those contentions are without merit.

Section 1818(i)(2)(i), as in effect at the time of petitioners' actions, provided:

> Any insured bank which violates or any * * * director * * * participating in the conduct of the affairs of such a bank who violates the terms of any order which has become final * * * shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues. * * *

12 U.S.C. 1818(i)(2)(i). That provision—which states that a director "who violates" any order "shall forfeit and pay a civil penalty"—subjects a director who violates a cease-and-desist order to future assessment of civil penalties. Obviously, when the future becomes the present, what was the present becomes the past. Thus, Section 1818(i)(2)(i) authorizes the Comptroller to assess penalties for actions that—at the time he actually assesses the penalty—are "past" violations.[4]

Petitioners' reliance on this Court's decision in *Gwaltney* is misplaced. The issue in that case was whether citizen plaintiffs could commence an action for injunctive relief and civil

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[4] There is nothing novel in this reasoning. For example, most criminal statutes, which impose penalties for past violations, are phrased in similar terms. See, *e.g.*, 18 U.S.C. 471-513 (counterfeiting and forgery offenses). As the court of appeals explained, the Comptroller's interpretation is also consistent with the provision's deterrent objective and its legislative history. Pet. App. 25-37.

penalties under the citizen suit provisions of the Clean Water Act, which provide, in pertinent part, that:

> any citizen may commence a civil action on his own behalf—
>
> > (1) against any person * * * who is alleged to be in violation of (A) an effluent standard or limitation under this chapter * * *.

33 U.S.C. 1365(a). This Court concluded that the citizen could satisfy this requirement through "a good-faith allegation of ongoing violation." *Gwaltney*, 484 U.S. at 67. The Court's interpretation of the Clean Water Act's citizen suit provisions shed no light on the proper interpretation of the markedly different language of Section 1818(i)(2)(i). Rather, the Clean Water Act's civil penalty provisions are the appropriate source for comparison. The Clean Water Act provides, in language comparable to Section 1818(i)(2)(i), that

> any person who violates any [compliance] order issued by the Administrator * * * shall be subject to a civil penalty not to exceed $25,000 per day for each violation.

33 U.S.C. 1319(d). The Court observed in *Gwaltney* that "it is little questioned that the Administrator may bring enforcement actions to recover civil penalties for wholly past violations." 484 U.S. at 58. Thus, the Court's decision in *Gwaltney* supports the Comptroller's interpretation of his authority here.

Petitioners' reliance on the Seventh Circuit's decision in *Cutten* is similarly misplaced. The issue in that case was whether the Secretary of Agriculture could suspend a commodity trader's privileges under the Grain Futures Act of 1922, ch. 369, 42 Stat. 998, based on regulatory violations that had occurred two years prior to the issuance of the com-

plaint. Section 6(b) of the Act provided, in relevant part, that

> If the Secretary of Agriculture has reason to believe that any person is violating any of the provisions of this Act * * * he may serve upon such person a complaint stating his charge in that respect * * *.

42 Stat. 1002. As this Court explained, the Seventh Circuit "held that the power conferred by § 6(b) is remedial, not punitive; that it is limited to suspending a trader * * * who is presently committing an offence." 298 U.S. at 236. That provision, which specifically gave the Secretary authority to issue a complaint concurrent with the finding of an ongoing violation, bears little similarity to Section 1818(i)(2)(i), which subjects a present violator of a cease-and-desist order to future penalties. Hence, the Seventh Circuit's decisions in *Cutten* and this case are not inconsistent.[5]

2. Petitioners also contend that the court of appeals erred in holding that they had received constitutionally adequate notice that they would be subject to civil penalties. Pet. 30. See also Pet. 25-27. As the Comptroller explained, the cease-and-desist order itself amply informed petitioners that they were obligated to cease their violations, and Section 1818(i)(2) set forth the consequences of their failure to do so. See Pet. App. 17. Petitioners, who are voluntarily engaged in a pervasively regulated industry, are expected to understand their legal obligations. Cf. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947). Additionally, the Comptroller gave petitioners repeated warnings, prior to issuance of the October 1985 Notice, that their actions would result in imposition of civil penalties.

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[5] In any event, a conflict between those decisions would present, at most, an intra-circuit disagreement that would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Pet. App. 38-39. As the Seventh Circuit explained, the Comptroller did not "lull" petitioners "into a false sense of security." *Id.* at 39. The October 1985 Notice and subsequent amendments gave petitioners clear notice of the charges, and petitioners had ample opportunity to present their defenses in the administrative and judicial proceedings. Thus, there was no lack of due process in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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